30742
EB

SERVICE DATE - MARCH 2, 2000

SURFACE TRANSPORTATION BOARD

DECISION

Finance Docket No. 31700

CANADIAN PACIFIC LIMITED, ET AL.

—PURCHASE AND TRACKAGE RIGHTS —

DELAWARE & HUDSON RAILWAY COMPANY

Decided: February 29, 2000

On December 17, 1999, the American Train Dispatchers Department of the International Brotherhood of Locomotive Engineers (ATDD or union) filed a petition asking us to reopen this proceeding pursuant to 49 U.S.C. 722(c)[1] on the basis of substantially changed circumstances and to stay the planned transfer of certain dispatching operations from Milwaukee, Wisconsin, to Montreal, Canada, while we address safety issues associated with that transfer. We understand ATDD's concerns about moving the dispatching function to Canada. But we are not the Federal agency principally responsible for the safety issues that ATDD raises — the Federal Railroad Administration (FRA) in the U.S. Department of Transportation (DOT) is — and we can act to address ATDD's concerns only if DOT or FRA brings to our attention sufficient safety concerns as to constitute changed circumstances. DOT has hypothesized as to possible safety issues, but it has indicated that it does not know whether the transfer will compromise safety; thus, we cannot find that ATDD has shown substantially changed circumstances, and we must deny the petition.

BACKGROUND

In this proceeding, our predecessor, the Interstate Commerce Commission (ICC), in 1990 approved the application of Canadian Pacific Railway Company (CP)[2] to acquire the Delaware and Hudson Railway Company (D&H) subject to several conditions, including standard employee protective conditions.[3] Canadian Pac. Ltd. et al. — Purchase & Trackage Rights — Delaware &

---

[1] Under 49 U.S.C. 722(c), we may reopen a proceeding at any time, on our own initiative or on petition by an interested party, because of material error, new evidence, or substantially changed circumstances.

[2] Formerly Canadian Pacific Limited.

[3] See New York Dock Ry. — Control — Brooklyn Eastern Dist., 360 I.C.C. 60, 84-90

(continued...)

Hudson Ry., 7 I.C.C.2d 95 (1990) (Acquisition Approval). The standard labor conditions require railroads and their employees to reach an implementing agreement, using arbitration if necessary, before carrying out any operational changes that flow from the approved consolidation.

Two years later, the D&H dispatching functions were moved from New York to Wisconsin pursuant to a voluntary implementing agreement between the carrier and ATDD. Subsequently, in 1996, CP proposed to transfer all dispatch positions from Wisconsin to Canada. The union objected, and the dispute was submitted to arbitration. The arbitrator ruled that the carrier could move the dispatch function as part of the rail consolidation authorized in Acquisition Approval.

The union appealed the arbitral ruling to the Board, arguing that the proposed transfer (1) is not encompassed in the authorization received in Acquisition Approval and (2) poses serious safety concerns. ATDD submitted a March 1998 letter sent to CP by the Director of the Office of Safety Assurance and Compliance of the FRA expressing concerns about the safety of moving the dispatch function from the United States to Canada in light of certain differences in standards between the two countries involving drug testing and hours of service.[4]

In Canadian Pac. Ltd. et al. — Purchase & Trackage Rights — Delaware & Hudson Ry. (Arbitration Review), STB Finance Docket No. 31700 (Sub-No. 13) (STB served Sept. 18, 1998) (Arbitration Review), we (1) determined not to set aside the arbitrator's ruling that the transfer of the dispatching function to Canada falls within the scope and authority of the Acquisition Approval, (2) found the arbitral decision consistent with the New York Dock conditions, and (3) concluded that the safety concerns did not furnish a legal basis for reviewing the arbitrator's decision.

On December 3, 1998 — just three days before the transfer was scheduled to occur — ATDD filed an emergency petition to reopen and reconsider our Arbitration Review decision and a motion to stay the transfer pending that reconsideration. ATDD argued that it had new evidence that the transfer would compromise safety: two further letters from FRA officials to CP[5] "strongly request[ing]" that CP postpone moving any dispatch positions to Canada. Acting on the union's emergency request, we ordered the carrier not to transfer the dispatch positions "until we have been

---

[3](...continued)
(1979), aff'd sub nom. New York Dock Ry. v. United States, 609 F.2d 83 (2d Cir. 1979) (New York Dock).

[4] ATDD had also submitted a March 1995 letter sent by the same FRA official to CN America, Grand Trunk Western Railway (CN), expressing similar concerns about a CN plan to replace domestically based dispatch with Canadian-based dispatch over CN's rail lines in Michigan. CN subsequently dropped that plan.

[5] ATDD also submitted an FRA letter addressed to ATDD on the same subject.

advised that the safety concerns of FRA have been satisfied."[6] Canadian Pac. Ltd. et al. — Purchase & Trackage Rights — Delaware & Hudson Ry. (Arbitration Review), STB Finance Docket No. 31700 (Sub-No. 13) (STB served Dec. 4, 1998) (Refrain Order).

On judicial review, the United States Court of Appeals for the District of Columbia Circuit vacated our Refrain Order, finding no lawful basis for blocking the transfer of the dispatching function in the context of review of an arbitral decision. Canadian Pac. Ry. v. STB, 197 F.3d 1165 (1999). The court concluded that the FRA correspondence submitted by the union can "in no sense . . . be thought evidence directed to any disputed fact . . . [n]or can the order fairly be read as embodying a factual determination by the Board," id. at 1167, and that, in any event, the letters did not provide a basis for overturning or modifying the arbitrator's award as "it is not apparent how it could be demonstrated that the arbitrator exceeded his authority nor how the union's 'safety' concerns are relevant," id. at 1168.[7] In view of the court's ruling, we subsequently denied ATDD's petition to reopen and reconsider our Arbitration Review decision. Canadian Pac. Ltd. et al. — Purchase & Trackage Rights — Delaware & Hudson Ry. (Arbitration Review), STB Finance Docket No. 31700 (Sub-No. 13) (STB served Dec. 16, 1998).

In its petition filed December 17, 1999, ATDD now asks us to reopen the underlying acquisition approval proceeding to investigate whether the transfer to Canada of train dispatching operations over domestic rail lines should be allowed and, if so, under what conditions. ATDD also asks us to stay the transfer of dispatcher positions until we conclude our investigation of the safety issue. The union asserts that a transfer of train dispatching operations outside the United States constitutes a substantial change in circumstances because neither the ICC nor FRA considered, at the time of the original approval, the safety implications that such a move might have. ATDD also notes that Acquisition Approval preceded our current practice of requiring applicants seeking authority for a rail consolidation to file safety integration plans (SIPs).[8]

The carriers respond that the broad authority granted in Acquisition Approval encompasses the consolidation of dispatch functions and that the arbitrator's finding on that issue was affirmed in

---

[6] CP has since moved the dispatching function from Milwaukee to Minneapolis as an interim measure.

[7] The court rejected as "counsel's post hoc rationale" arguments that authority for the action taken in our Refrain Order did not depend solely upon our arbitral review powers, but could be based on the emergency order authority in 49 U.S.C. 721(b)(4) and our merger supplemental order authority in 49 U.S.C. 11327. Id.

[8] See CSX Corp. et al., Norfolk Southern Corp. et al. — Control and Operating Leases/Agreements — Conrail Inc. et al., STB Finance Docket No. 33388 (Decision No. 89) (STB served July 23, 1998) at 155; Canadian National Ry., et al. — Control — Illinois Central Corp., et al., STB Finance Docket No. 33556 (STB served May 21, 1999) at 46, 150.

our Arbitration Review decision. They state that no evidence has been submitted to support the assertion that the planned transfer will compromise safety.

On January 21, 2000, DOT submitted a pleading in support of ATDD's petition.[9] DOT expresses concern that the existing law might not give FRA (or its Canadian counterpart) enough authority to fully address potential safety concerns. DOT reiterates the concerns regarding Canada's less stringent regulations with respect to operational testing, alcohol and drug testing, and hours of service. To address the safety issues associated with foreign-based dispatching of U.S. rail operations that FRA began looking into as early as March 1995, DOT states that FRA is planning to institute a rulemaking proceeding "within the next few months."[10] Accordingly, DOT asks us to stay the transfer of the dispatching function here and investigate these issues while FRA conducts its rulemaking.

DISCUSSION AND CONCLUSIONS

We see no legal grounds on which we can reopen this proceeding in order to stay the transfer. The fact that the SIP procedure was not in place at the time this case was decided does not provide a basis for reopening this case. Generally, an agency may not retroactively apply a change of policy to administratively final decisions. See Bowen v. Georgetown Univ. Hosp., 488 U.S. 204 (1988). Thus, we do not reopen administratively final decisions merely because we might handle or decide them differently today. For us to reopen a proceeding long after the time permitted for administrative reconsideration,[11] we must be presented with a situation so compelling that the normal interests of reliance and repose (which ordinarily militate against revisiting prior actions) are overcome.

ATDD argues that neither the ICC nor FRA specifically considered the impact of a transfer of the dispatching function to Canada. A decision authorizing a consolidation, however, need not expressly anticipate specific subsequent integration actions in order for those actions to be

---

[9] CP objects to DOT's untimely pleading. In view of the importance of safety and DOT's expertise regarding rail safety matters, we will accept its submission.

[10] DOT Response at 6. DOT indicates that it did not act sooner because, as of now, Canadian dispatching of U.S. carriers is minimal. As CP notes, however, until their recent sale, all of CP's lines in Maine and Vermont were dispatched out of Canada.

[11] See 49 CFR 1115.3(e).

encompassed in the approval of the consolidation,[12] and indeed the arbitrator here already found that the proposed dispatching changes flowed from the ICC's approval of the consolidation.[13]

In any event, ATDD recognizes that the consolidation authorized in Acquisition Approval could result in some transfer of dispatching functions, but it argues that moving them to Canada constitutes changed circumstances because of the safety concerns that such a move would raise. But ATTD's petition merely refers to the FRA correspondence that it previously submitted (prior to the Refrain Order), which the court of appeals found inadequate in the context of that proceeding. Although ATDD asserts that we are "well aware" of the existence of a safety problem, we have made no specific factual determination in this regard, and ATDD's petition makes no specific showing either, instead simply relying on the FRA letters to support its position.

Thus, we turn now to DOT's pleading on behalf of FRA, as we give great weight to the views of the Federal body with expertise in rail safety. In its pleading, DOT hypothesizes as to several potential safety issues but concedes that it does "not at this juncture know whether the movement of dispatching operations for [domestic] rail lines to locations outside the United States should be allowed, allowed subject to conditions, or prohibited."[14] DOT has not suggested when FRA would conclude its rulemaking and be prepared to provide its views on whether the potential safety concerns that it has identified necessitate any remedial action. Given DOT's own uncertainty as to whether corrective action is required, it would be premature for us to reopen the underlying acquisition proceeding to impose a condition foreclosing CP's right to transfer the dispatching function to Canada.[15] Moreover, for us to institute an investigation at this time would be needlessly duplicative of FRA's efforts.[16] When FRA has better formulated its position regarding the

---

[12] See CSX Corp. Control — Chessie and Seaboard C.L.I., 8 I.C.C.2d 715, 717, 720-21 (1992), aff'd sub nom. American Train Dispatchers Ass'n v. ICC, 26 F.3d 1157 (D.C. Cir. 1994).

[13] As the arbitrator noted, the ICC recognized that the rail system of D&H "will be fully integrated into the CP rail system, both operationally and financially." Acquisition Approval, 7 I.C.C.2d at 99 n.7.

[14] DOT Response at 8.

[15] See American Tel. & Tel. Co. v. FCC, 978 F.2d 727, 732-33 (D.C. Cir. 1992) (FCC's arbitrary and capricious action in dismissing complaint based on future rulemaking "is similar to a judge dismissing a complaint based on a statute because he has been informed that Congress is conducting hearings on whether to change the statute"), cert. denied sub nom. MCI Telecoms. Corp. v. American Tel. & Tel., 509 U.S. 913 (1993).

[16] We are concerned that such an investigation would be open-ended, as we would necessarily depend upon DOT to develop the record regarding its safety concerns, but DOT apparently would not be in a position to do so until FRA completes its own rulemaking proceeding

(continued...)

magnitude of any safety problem that might be identified and what conditions, if any, might be appropriate regarding Canadian-based dispatching, we will be better able to assess whether or not it would be appropriate to reopen this proceeding to consider any request by FRA for a specific condition. If there are any urgent safety problems in the meantime**,** FRA, which, as we have noted, is the agency principally responsible for rail safety, can exercise its own emergency powers (see 49 U.S.C. 20104(a)).[17]

This decision will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. DOT's response to ATDD's petition is accepted.

2. The petition to reopen is denied without prejudice to refiling at an appropriate future time.

3. In view of the foregoing, the petition to stay is denied.

4. This decision is effective April 1, 2000.

By the Board, Chairman Morgan, Vice Chairman Burkes, and Commissioner Clyburn.

Vernon A. Williams
Secretary

---

[16](...continued)
that it has not yet instituted. We do not believe that there are any non-safety related concerns stemming from foreign-based dispatching that need further investigation. We reject DOT's suggestion that, notwithstanding our broad powers to regulate the carriers that operate in this country, we might somehow be unable to enforce a directed service order over track located in this country merely because it is dispatched from Canada.

[17] Having concluded that we should not reopen our proceeding at this time, we agree with CP that it would be improper for us, as an independent agency, to issue a stay of indefinite duration while we await the completion of FRA's rulemaking proceeding.